No. 12,531

IN THE

United States Court of Appeals

For the Ninth Circuit

State Farm Mutual Automobile Insurance Company (a corporation),
Appellant,

vs.

Bertha Lee Porter, as Special Administratrix of the Estate of Charles E. Porter, Deceased,
Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

I.

SINCE THE INSURANCE CONTRACT IN QUESTION WAS ENTERED INTO IN NEBRASKA, THE LAW OF NEBRASKA SHOULD BE APPLIED HERE IN DETERMINING THE RIGHTS OF THE PARTIES THEREUNDER.

Appellee is quite correct in stating that in a diversity case such as this it is the duty of the Federal Court to examine the conflict of laws rule of the forum in which it is sitting and apply it in determining which rule of law governs the situation before it.

Appellee makes the statement that the California rule requires the application of California law to the interpretation of a foreign contract. At page 17 of

her brief five cases are cited in support of this proposition:

The case of *Tevis v. Pitcher* (1858), 10 Cal. 465, held that the law of the locality where a will was executed should be applied in determining its efficacy. California law was followed as to the method of proving the will only for the reason that the law of the locality where the will had been executed was repealed and, therefore, nonexistent. The will in this case was executed in San Francisco at a time when it was still within Mexican territory.

In the case of *Curry v. Williams* (1930), 109 Cal. App. 649, 293 Pac. 623 and *Ogburn v. Travelers Ins. Co.* (1929), 207 Cal. 50, 276 Pac. 1004, neither Court was concerned with a choice of law as between two jurisdictions and consequently neither case can be said to hold anything with respect to a rule of conflict of laws.

In the case of *Sage & Co. v. Alexander & Oviatt Corp.* (1934), 138 Cal. App. 476, 32 Pac. (2d) 655, a warranty question arose with regard to articles manufactured and contracted for in France and delivered to the buyer in California. In touching on the question of whether or not there had been any breach of warranty appellant urged that reference must be had to *conditions* as they existed at the place of manufacture. The Court merely held that their condition on arrival was pertinent to the issue.

The case of *Delanoy v. Delanoy* (1932), 216 Cal. 27, 13 Pac. (2d) 719, was concerned with the problem of whether or not full faith and credit should be ac-

corded a decree of divorce granted by a sister state. To this extent it was concerned with conflict of laws. There was no issue as to whether Pennsylvania or California law should be applied respecting the presumption of validity and consequently the Court did not hold in this respect.

Appellee does not even mention, much less distinguish, the cases cited at page 19 of appellant's brief.

II.

THE ISSUES ON THIS APPEAL ARE NOT LIMITED TO A CONSIDERATION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE JURY'S VERDICT.

Without the citation of a single authority appellee, on page 19 of her brief, advances the proposition that this Court is limited to a consideration of the sufficiency of the evidence as to the issues of permissive use and waiver and estoppel. That a motion for directed verdict or for judgment *n. o. v.* is in the nature of a demurrer to the evidence is a fundamental proposition. *Estate of Lances* (1932), 216 Cal. 397, 14 Pac. (2d) 768. Accordingly, the issue is tendered to this Court whether appellee is entitled to recover even assuming the evidence is sufficient to establish waiver and estoppel.

III.

THE EVIDENCE WAS, AS A MATTER OF LAW, INSUFFICIENT TO ESTABLISH PERMISSIVE USE; ANY INFERENCE OF PERMISSION WAS DISPELLED AS A MATTER OF LAW BY THE UNCONTRADICTED EVIDENCE ESTABLISHING THE NON-EXISTENCE OF PERMISSION.

(a) The Court is not restricted to a consideration of plaintiff's evidence in determining whether or not there was sufficient support for the verdict of the jury.

Throughout her brief (pp. 17, 18, 29 and 30) appellee insists upon the proposition that this Court can consider only the evidence adduced by her below. It is claimed at page 18 of her brief that evidence for the defense must be disregarded.

It is, of course, the rule on a motion for directed verdict or for judgment notwithstanding the verdict that the Court must consider the evidence in the light most favorable to the prevailing party. All reasonable inferences must be indulged and any *conflict* in the evidence must be resolved in favor of the prevailing party.

This does not mean that the Court must take a myopic view of the evidence or cut and paste from the record in order that isolated shreds may be bound together out of context to give credence to a finding which would be wholly unreasonable and unfounded when considered in the light of the whole evidence. This is pointed out in the case of *Engstrom v. Auburn Auto. Sales Corp.* (1938), 11 Cal. (2d) 64, 77 Pac. (2d) 1059. In that case a directed verdict in favor of defendant was affirmed on appeal. It will be noted that the Court in that case did not restrict itself to a

consideration of plaintiff's evidence, but relied upon the uncontradicted testimony of defendant's witnesses in holding as a matter of law that the inference of permissive use was dispelled.

Justice Shenk, speaking for the Supreme Court, in *Estate of Lances* (1932), 216 Cal. 397, 14 Pac. (2d) 768, points out that the function of a trial Court on a motion for directed verdict or judgment notwithstanding the verdict is the same as that of a reviewing Court in determining whether there is evidence to support a verdict.

Appellee does not dispute that conflicts are to be resolved in favor of the prevailing party. A Court can hardly resolve a conflict if the evidence of the opposing party is not to be considered. As was pointed out in *Estate of Burns* (1938), 26 Cal. App. (2d) 741 at 743-744, 80 Pac. (2d) 77:

> "The expression, 'disregarding conflicting evidence' obviously means to disregard only the fact that there is a conflict in the evidence and give full credit only to that portion of the evidence, whether produced by plaintiff or defendant, which tends to support the allegations contained in plaintiff's complaint."

We know of no case which has modified or overruled the rules announced by the above authorities. The case of *Chakmakjian v. Lowe* (1949), 33 Cal. (2d) 308, 201 Pac. (2d) 801, far from restricting the rule of the *Engstrom* case, cites it with unqualified approval.

The case of *Nash v. Wright* (1947), 82 Cal. App. (2d) 467, 186 Pac. (2d) 686, relied on so heavily by

appellee, is a decision of the District Court of Appeal and thus cannot be said to modify or overrule the *Engstrom* case, a decision of the Supreme Court, particularly in view of the later decision in *Chakmakjian v. Lowe,* supra, a Supreme Court case, which gives its unqualified approval to the *Engstrom* case.

The teaching of these cases is quite clear. A conflict in the evidence will be disregarded, but evidence which does not *conflict* with the evidence of plaintiff, but which *controverts the ultimate facts* sought to be established by plaintiff's evidence and cannot rationally be disbelieved will be given full credit. This is pointed out in the case of *Blank v. Coffin* (1942), 20 Cal. (2d) 457, 126 Pac. (2d) 868, in the portions quoted by appellee at pages 30 to 32.

(b) The evidence was insufficient to support a finding of permissive use.

The evidence relied upon by appellee to support the jury's implied finding in this regard consists of isolated facts appearing in the record. Appellee points out the ownership of the car by Mr. Mehlin, the marriage relationship between Mr. and Mrs. Mehlin and the fact that Claggett had the express permission of Mrs. Mehlin. In addition she relies upon certain "admissions" made, not by the parties involved, but by the agents of appellant, to wit, statements of Dennis respecting coverage; statements of Gripenstraw respecting permissive use; the admission of permissive use contained in Claggett's first answer, and a purported admission implied from language to be found in the affidavit of Paul C. Dana. (Appellee's

brief, pp. 20 to 28.) Appellee completely ignores the uncontradicted evidence which qualifies and explains and fills in the true picture respecting these circumstances. This evidence may be summarized as follows: (It is extremely important to consider the fact that all of this following evidence is uncontradicted; that no attempt was made by appellee to dispute it by direct testimony, or otherwise, and that it does not *conflict* or tend to disprove any of the above factual circumstances, but is perfectly consistent with their truth, and, therefore, cannot be said to be in conflict with them. It does, however, conclusively rebut the ultimate fact of permission sought to be established by appellee, by way of confession and avoidance, so to speak, by filling in the facts necessary to give the true picture.) This evidence showed that Mrs. Mehlin had her husband's permission for general domestic use of the automobile in and about the City of Lincoln (and not the unrestricted right to use the automobile as appellee would have it); that she took the automobile, her small son, and two strange men, deserted her husband and departed for California without his permission, with the intent to separate permanently from him and remain permanently in California. Two weeks *before* the accident occurred Mr. Mehlin swore out a warrant for his wife's arrest. When Mrs. Mehlin was first interviewed by Dennis she made a positive misrepresentation by stating that she had merely come to California on a visit, thus giving the impression that the venture had her husband's blessing. *Every so-called admission of appel-*

lant, or its agents, relied upon by appellee was made at a time when the true facts regarding Mrs. Mehlin's desertion were unknown to appellant, or its agents, and while they were still relying on the truth of the representations made by Mrs. Mehlin to Dennis. When the true facts were ascertained a course of conduct consistent with the discovery was immediately embarked upon. The original answer was withdrawn and an amended answer was filed. The defense was asserted, a reservation of rights was immediately taken from Claggett and appellee was notified of the facts.

Appellee offered no evidence which conflicted in any way with these proven facts. This same evidence contradicts no single *fact* proved by appellee, but effectually disposes of any inference of permission by disclosing the whole situation rather than isolated circumstances.

The situation is similar to a case where plaintiff seeks to recover for assault and proves that defendant struck him. Defendant proves that, at the time, plaintiff was engaged in robbing defendant at the point of a gun, a fact which plaintiff makes no attempt to disprove. We doubt if even Mr. Castro would seriously claim that an Appellate Court would be foreclosed from considering evidence such as this. The parallel between the evidence outlined above and the evidence discussed in the case of *Engstrom v. Auburn Auto. Sales Corp.,* supra, is unmistakable and is (we submit) determinative.

(c) The fact that Claggett had express permission of Mrs. Mehlin is of no consequence as to the issue of initial permission.

At page 22 appellee cites two cases (*Souza v. Corti* (1943), 22 Cal. (2d) 454, 139 Pac. (2d) 645; and *Haggard v. Frick* (1935), 6 Cal. App. (2d) 392, 44 Pac. (2d) 447). As appellee's own statement points out, there was no question respecting the *initial* permission in those cases. They are of no aid, therefore, where, as here, initial permission is absent.

(d) The so-called "admissions" of coverage and permission by insurer are not evidence of the alleged fact of permission and cannot be so considered.

As pointed out at pages 23 and 24 of appellee's brief certain agents of appellant uttered certain statements respecting coverage and permission in the instant case. As noted above these were admittedly made at a time when neither appellant nor its agents who made the statements had any knowledge concerning the true facts of Mrs. Mehlin's departure, but were, in fact, acting in reliance on her representations. Appellee introduced no evidence to show that any of the persons uttering these so-called admissions had any authority to bind appellant. In the absence of such evidence this testimony cannot be considered as evidence in support of the allegations of permission.

Guberman v. Weiner (1935), 10 Cal. App. (2d) 401, 51 Pac. (2d) 1141.

Appellee, of course, cannot claim that the declarations of the agents themselves were competent to estab-

lish this authority (even if their testimony were susceptible of this interpretation) since the rule requires that other evidence must establish this agency, and its scope.

See:

Brown v. Spencer (1912), 163 Cal. 589, 126 Pac. 493.

With respect to the supposed admission contained in the original answer of Claggett, appellee at pages 24 through 26 of her brief argues strenuously that this was evidence of the fact of permissive use. As we pointed out at page 26 of our opening brief, statements in abandoned or superseded pleadings cannot be used as evidence of the fact. Appellee attempts to distinguish the cases of *Kambourian v. Gray* (1947), 81 Cal. App. (2d) 783, 185 Pac. (2d) 27; *Gajanich v. Gregory* (1931), 116 Cal. App. 622, 3 Pac. (2d) 389, and *Weissbaum v. Eibeshutz* (1930), 211 Cal. 170, 294 Pac. 396, by pointing out that in each of those cases the pleading was used only for impeachment. As a reading of these cases will disclose, that fact was the very fact upon which the Court in each case held that no error was committed. Each case states that an attempt to utilize such a statement for any other purpose would be error. The case of *Coward v. Clanton* (1889), 79 Cal. 23, 21 Pac. 359, cited by appellee is in no way inconsistent with the holdings of any of the foregoing *later* cases. The cases of *Tieman v. Red Top Cab Co.* (1931), 117 Cal. App. 40, 3 Pac. (2d) 381, and *Dolinar v.*

Pedone (1944), 63 Cal. App. (2d) 169, 146 Pac. (2d) 237, an examination will disclose, do not involve abandoned or superseded pleadings.

The above pleading was admittedly admissible for impeachment. Appellee here attempts to capitalize on the fact that no objection was made below to limit its effect. Appellant, of course, realized that it was admissible for its limited purpose and, therefore, did not object on the trial. We do not read the authorities cited by appellee as holding that we are now foreclosed from urging that it should be given no more than its proper effect. The case of *Holzer v. Read* (1932), 216 Cal. 119, 13 Pac. (2d) 697, involved the failure to move to strike an unresponsive answer. Its application to these facts is difficult to see. The case of *Goode v. Smith* (1859), 13 Cal. 81, did not involve a question of admissibility for a limited purpose at all, but was concerned with the failure to object to evidence wholly improper. The same is true of the cases of *Riverside Rancho v. Cowan* (1948), 88 Cal. App. (2d) 197, 198 Pac. (2d) 526; *Ingraham v. Smith* (1948), 83 Cal. App. (2d) 807, 189 Pac. (2d) 721 and *Hatfield v. Levy Bros.* (1941), 18 Cal. (2d) 798, 117 Pac. (2d) 841.

The attempt of appellee to base an inference upon the facts stated in the affidavit of Paul C. Dana (appellee's brief pages 26 to 28) is, we submit, a resort to speculation. Appellee finds herself in the rather strange position of relying on an inference to be drawn from evidence which she claims is im-

proper, or at least to be limited only to the question of waiver and estoppel. We do not think it is reasonable to accord to this affidavit, which was submitted in support of appellant's motion for leave to file an amended answer, any more weight as an admission of permission than the so-called admission contained in the original answer itself.

(e) The presumptions of obedience to the law and innocence of wrong may not here be invoked by appellee.

Appellee calls to her aid at pages 28 and 29 of her brief the statutory presumptions that the law has been obeyed and that a person is innocent of wrong. The cases of *Prickett v. Whapples* (1935), 10 Cal. App. (2d) 701, 52 Pac. (2d) 972 and *Lanfried v. Bosworth* (1941), 45 Cal. App. (2d) 408, 114 Pac. (2d) 406, lend some color of support to this claim. These cases, however, decisions of the District Court of Appeal, are (we submit) not to be relied upon in this connection. In the *Prickett* case there was no petition for a hearing by the Supreme Court. Neither case has been cited nor approved with reference to their holdings in this connection by any other case since decided. The case of *Bradford v. Sargeant* (1933), 135 Cal. App. 324 (approved in *Engstrom v. Auburn,* supra) is in flat contradiction to the rules announced in the *Prickett* and *Lanfried* cases. The case of *Nash v. Wright,* supra, merely observes that plaintiff's proof is aided by these presumptions, but does not hold that the presumptions will support a finding of permission in the absence of other proof.

We have read the case of *Souza v. Corti* (1943), 22 Cal. (2d) 454, 139 Pac. (2d) 645, in its entirety and fail to discover wherein these presumptions are even mentioned.

The case of *Vaughn v. Jonas* (1948), 31 Cal. (2d) 586, 191 Pac. (2d) 432, was an assault case and cannot be said to be of aid to appellee here where permissive use is the issue.

That the *Prickett* and *Lanfried* cases are unreliable authority for the proposition that these presumptions can support a finding of permissive use in the absence of other evidence is demonstrated by the numerous cases holding that mere evidence of ownership standing alone does not raise an inference of permissive use.

Stewart v. Norsigian (1944), 64 Cal. App. (2d) 540, 149 Pac. (2d) 46;

Engstrom v. Auburn Auto. Sales Corp., supra;

diRebaylio v. Herndon (1935), 6 Cal. App. (2d) 567;

Krum v. Malloy (1943), 22 Cal. (2d) 132;

Barcus v. Campbell (1949), 90 Cal. App. (2d) 768, 204 Pac. (2d) 65;

Helmuth v. Frame (1941), 46 Cal. App. (2d) 381.

(f) Appellee's "proof" and any inferences arising therefrom were conclusively rebutted by appellant's evidence.

At pages 29 through 33 of her brief appellee argues that appellant's proof was insufficient to overcome any inference of permissive use and was insufficient

to rebut as a matter of law her so-called proof that Claggett was using Mr. Mehlin's automobile with his permission and consent. As above pointed out the Court in determining this issue must consider the whole evidence, resolving conflicts, to be sure, in appellee's favor, but not blinding its eyes to uncontradicted evidence which dissolves an inference technically permissible from the bare facts established by appellee. As we have pointed out above, the only evidence of the fact of permission established that Mr. Mehlin owned the car; that Mrs. Mehlin took the car to California; and that Mrs. Mehlin gave Claggett express permission to use it on the occasion in question. The various so-called admissions do not carry this proof any further since they cannot be considered as evidence of the fact of permission.

We concede, *arguendo,* that an inference of permission might be drawn from the facts of Mrs. Mehlin's possession, plus the fact of her marriage to Mr. Mehlin.

The uncontradicted evidence, however, which discloses the true circumstances of Mrs. Mehlin's taking, repels and rebuts any such inference of permission. Inferences may be drawn from the evidence only when it is reasonable to do so. We often hear the statement that an Appellate Court when considering the sufficiency of the evidence cannot weigh it or pass on the credibility of witnesses. This contention was effectually answered in the case of *Montanya v. Brown* (1939), 31 Cal. App. (2d) 642, 88 Pac. (2d) 745. At page 647 it states as follows:

> "Respondents also contend that the application of the Engstrom case rule to a state of facts such as we have here, would amount to an invasion by the reviewing court of the right of the jury to pass upon the credibility of the witnesses; and that in any event said rule should not be applied where, as here, the rebuttal testimony is given by interested parties. We are of the opinion that there is no merit in either point."

Particularly germane to the instant case is the Court's observation at page 72 of its opinion in the *Engstrom* case:

> "This undisputed testimony precludes any attempt to infer that Silkman's use of the car was a permissive one. Appellant's argument if carried to its logical extreme would permit an inference of permissive use from ownership alone even in the face of uncontroverted proof that at the time of the accident the car was being operated by one who had stolen it."

So in the case at bar it would be manifestly unreasonable to infer permissive use in Mrs. Mehlin from the sole fact of Mr. Mehlin's ownership and her possession, plus the fact of their marriage, in the face of the uncontroverted proof that she took the car without his permission, deserted him, and ran off to California with two strange men, intending to remain there.

The case of *Engstrom v. Auburn Auto. Sales Corp.*, supra, is on all fours with the instant case in its

application of these rules to a similar set of facts. There, as here, the defendant's evidence in no material respect conflicted with that of the plaintiff, but rather enlarged the picture and painted the whole situation in its true light rather than in the limited sense to which plaintiff attempted to restrict it. In the case at bar there was no evidence offered by appellee to contradict or rebut the testimony which disclosed the true circumstances of Mrs. Mehlin's taking.

Appellee argues that the testimony of Mr. and Mrs. Mehlin could be disbelieved because of their interest in the case. That contention was advanced and disposed of by the Court in the portions above quoted from the case of *Montanya v. Brown,* supra.

Further it is difficult to determine what their interest was at the time their testimony was given. They were never served in Mrs. Porter's suit and at the time their depositions were taken, that law suit had been tried to judgment. At that time they were in no way involved and any question of possible personal liability in that connection had been resolved in their favor.

It is claimed by appellee that the *Engstrom* case has been restricted to a considerable degree. We are unable to discover any case which so restricts it. The case of *Nash v. Wright,* supra, attempts to explain it. However, this, a decision of the District Court of Appeal, cannot be said to restrict or modify the Supreme Court's decision in the *Engstrom* case, as we have pointed out above.

At page 36 of her brief, appellee cites six cases which it is claimed restrict the rule of the *Engstrom* case. An examination of these cases will disclose that not one questions the soundness of the *Engstrom* case, but that, rather, each held its rule inapplicable under the facts of the particular case. Appellee's very statements of the facts purporting to distinguish the cases discussed by her on pages 37 and 38 disclosed their similarity and applicability to the case at bar.

IV.

AS A MATTER OF LAW THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH WAIVER OR ESTOPPEL.

The second ground relied on by appellee below and in this Court to support the judgment in her favor is that of waiver and estoppel, allegedly arising by virtue of the conduct of various agents of appellant and its attorneys between the time of the accident and the date when settlement negotiations were broken off in January of 1948. At the outset, the vital fact should be noted and borne in mind throughout that this conduct involved negotiations and communications between appellant and the attorneys for appellee. Without exception every case relied upon by appellee to support the claim of waiver and estoppel involves conduct as between the insurer and *its insured*. There is no evidence in this record respecting representations or conduct indicating a waiver or estoppel on the part of appellant as be-

tween itself and either the Mehlins or Claggett. We are cited to no case by appellee and we have discovered none in which it is held that an insurer's duties toward a claimant against its insured are identical with its duties to the insured himself. Appellee's contention thus proceeds in the absence of a major premise.

No doubt with this missing essential in mind, appellee at pages 38 through 40 of her brief cites numerous authorities to support the substitute contention that she is a beneficiary under Mr. Mehlin's policy. In support of this proposition the cases of *Bachman v. Independents Indemnity Company* (1931), 112 Cal. App. 465, 297 P. 110, and *Panhans v. Associated Indemnity* (1935), 8 Cal. App. (2d) 532, 47 P. (2d) 791 are cited. As pointed out in the case of *Hynding v. Home Accident* (1932), 214 Cal. 743 at 748, the statements to this effect in the *Bachman* case are dictum and unnecessary to the decision. It further points out at page 750 that the case of *Malmgren v. Southwestern Insurance Company* (1927), 201 Cal. 29, 255 Pac. 512 upon which the decision in the *Panhans* case was based, was greatly restricted in its scope by the federal decision of *Metropolitan v. Colthurst* (1936), 36 Fed. (2d) 559. These views announced in the *Hynding* case were reaffirmed in the case of *Purefoy v. Pacific Automobile,* 5 Cal. (2d) 81. See also *Western Machinery Company v. Bankers Indemnity,* 10 Cal. (2d) 488; *Valladao v. Fireman's Fund,* 13 Cal. (2d) 322 and *Vanderhoof v. Chambon,*

121 Cal. App. 118, for further expressions of the California Courts to the effect that a third party claimant is not a third party beneficiary in the legal sense of that term and that such a claimant's rights are derivative only, and are no greater than the rights of the person through whom the claimant seeks the benefit of the policy.

We are unable to discover anything in the cases of *Souza v. Corti* (1943), 22 Cal. (2d) 454, 139 P. (2d) 645; *Bayless v. Mull* (1942), 50 Cal. App. (2d) 66, 122 P. (2d) 608; or *Burgess v. Cahill* (1945), 26 Cal. (2d) 320, 158 P. (2d) 399, which conflicts with these views. It is difficult to see why appellee cites them since no coverage question was involved in any of them.

Appellee's attempt to constitute herself a party to the insurance contract in order to invoke in her behalf the duties of an insurer to its assured thus falls to the ground.

We do not quibble with appellee's definitions and distinctions concerning waiver and estoppel. The elements constituting each are too well settled in the law of this and every state. Nor do we quibble with the general proposition that constructive knowledge may be sufficient to establish a waiver or estoppel. We *are* concerned with the fact that the evidence adduced to support the claim of waiver and estoppel does not in fact establish either and is legally insufficient to do so.

We refer to the rule discussed above in connection with the scope of review on this appeal where the

sufficiency of the evidence must be considered. In that connection we refer to the evidence as a whole and rely on that evidence which is uncontradicted and which is not in conflict with any evidence produced by appellee.

As appellee herself points out, waiver cannot be established without a showing of knowledge and intent to waive (see appellee's brief pages 40 through 42). It is argued that actual knowledge of a policy defense of appellant is shown by the evidence. Care should be taken in examining the facts to consider them in their proper sequence. All of the conduct relied upon by appellee to establish waiver and estoppel took place between the time of the accident and the time, in January of 1948, when settlement negotiations were broken off. It is argued that by virtue of the assumption of Claggett's defense, the filing of an answer on his behalf, the admission contained in that answer (later withdrawn and amended) and the statements of appellant's various agents and their conduct of settlement negotiations, an intent to waive is indicated. Appellee makes this argument with a perfectly straight face and full in the teeth of the uncontradicted evidence which established that neither appellant nor any of its agents or attorneys, at that time, either knew or had reason to suspect the true circumstances of Mrs. Mehlin's taking of the car and desertion of her husband. Where the uncontradicted evidence shows that appellant had no knowledge of a policy defense it is indeed difficult to see how this evidence can establish an intent to waive the unknown

defense. Indeed, appellee assumes at page 45 of her brief, as a premise of her argument that the insurer had full knowledge of the facts entitling it to assert its defense. The fact that appellant's actions may have been inconsistent with an intent to enforce a right can be of little consequence where the existence of the right was unknown.

Appellee argues that appellant had constructive knowledge of its policy defense, i.e., had knowledge of facts and circumstances sufficient to put a prudent man on inquiry and is thus charged with knowledge of the facts which such inquiry would have disclosed. Reasonable minds (we submit) could draw no such intendment from the evidence. Appellee points out that at the time of the accident, which occurred in California, Claggett was driving the automobile, that Claggett had the express permission of Mrs. Mehlin to drive it, and that Mr. Mehlin at the time was in Lincoln, Nebraska, and was unacquainted with Claggett. Again appellee ignores the uncontradicted evidence which fills out and completes this evidence, i.e., that Adjuster Dennis, employed by appellant, interviewed Mrs. Mehlin and was informed by her *that she was on a visit to California.* Surely nothing could be more natural than this, and surely no statement was better calculated to forestall further inquiry into the circumstances surrounding the presence or absence of initial permission. The statement of Mrs. Mehlin simply confirmed what would be a natural assumption—that a wife's presence away from her home was with the consent of her husband. At

page 28 of her brief, appellee lays great stress upon the presumptions of innocence and obedience to the law. She is, in effect, hoist on her own petard when, in discussing constructive notice, she urges in effect that a prudent person would be put on notice by circumstances which would only seem to accord with these presumptions. Surely appellant was entitled to assume, in view of Mrs. Mehlin's statement, that she was innocent of wrong. It would, indeed, be ridiculous to require an insurer in every instance to presume that its insured was a liar and a fugitive from justice as well as a deserter of the home in order to avoid being saddled with the consequences of a holding that it had constructive knowledge of any such extraordinary state of facts.

The case of *Shapiro v. Equitable* (1946), 76 Cal. App. (2d) 75, 172 P. (2d) 725, did not involve a similar problem, but was concerned with whether plaintiff could claim lack of discovery of a fraud for purposes of tolling the statute of limitations. There plaintiff applied for a policy loan and first made inquiry *eight years* after the application as to why the money was not forthcoming. It was held that he thus had constructive notice of the agent's fraud. The case of *Northwestern P. C. Co. v. Atlantic P. C. Co.* (1917), 174 Cal. 308, 163 P. 47, gives scant comfort to appellee here. It was there held, even where a pledgee of stock knew that the pledgor held the stock as trustee, that the trustee was in financial difficulty and that the trustee wished the pledge kept secret, that the pledgee still did not

have constructive notice of the pledgor—trustee's fraud and was not required to make inquiry. The case of *Baxter v. National Mortgage Loan Co.* (1935), 128 Neb. 537, 259 N.W. 630, simply points out that one "cannot shut his eyes where he *knows* that *irregularities* have occurred".

As the *Baxter* case goes on to point out:

> "* * * the loan company had no actual knowledge as to the source of the funds from which the three checks were actually paid save as may be imputed to it due to the fact that Rolland F. Ireland, then attorney in fact for Baxter, was at the same time the secretary-treasurer and managing officer of the loan company.
>
> It would seem that the case of *State v. Farmers and Merchants Bank,* 112 Neb. 840, 201 NW 897, would negative imputed notice under the facts in this instant case."

See also *American Fire Insurance Company v. Landfare* (1898), 56 Neb. 482, 76 N.W. 1068 at 1070, where the Nebraska Court rejected the constructive notice theory.

Appellee attempts to distinguish cases cited by appellant on the ground that in each, the insured either made a positive misrepresentation of a material fact, or that the insurer had no knowledge of an alleged breach. Far from distinguishing these cases, these fact place them on all fours with the instant case, where Mrs. Mehlin made a positive misrepresentation concerning the nature of her visit to California and

the insurer was in ignorance of the true facts until long after settlement negotiations were broken off and an answer on behalf of Claggett filed. The fact that appellant, as soon as it obtained knowledge, immediately took a reservation of rights and notified appellee of its defense further serves to identify this case with those purportedly distinguished by appellee.

In connection with its claim that an estoppel was worked appellee argues that she was misled to her detriment, (or at least her attorneys so claim), at pages 54 to 57 of her brief. It is indeed difficult to spell out any misleading or detriment in the evidence. It is claimed that appellee lost the right to properly appraise the settlement offers. We think this Court will not look with favor upon the claim of appellee that she suffered detriment because she was not permitted to take advantage of a settlement offer made in ignorance of the true facts. The inference to be drawn from this argument is that appellee would have snapped up appellant's settlement offer had she been aware of the true facts. As counsel for appellee surely know, such an offer would never have been made had the true facts been known to appellant. We do not thus think it lies in the mouth of appellee to say that detriment was suffered because she lost the opportunity to secure the payment of money through mistake as to a material fact. This item of claimed detriment is manufactured out of whole cloth. We are cited to no case, significantly enough, which gives credence or support to this hollow contention.

Appellee argues that the trouble and expense of prosecuting the death action constituted legal detriment. The inference to be drawn from this statement is that appellee's attorneys do not accept cases where the prospective defendants are not covered by insurance. Whether or not a death action was to be filed was a matter to be determined by the merit of the facts in that case (we submit). In any event, we fail to see how appellee was prejudiced by the filing of an action which resulted in a judgment in her favor of $30,000. There was no evidence offered to prove Claggett was insolvent. Surely her claim of detriment is chimerical in the extreme.

The case of *Home Fire Insurance Co. v. Kennedy* (1896), 47 Neb. 138, 66 N.W. 278, is of no aid to appellee in this connection. In that case, with knowledge of the facts constituting its defense, the company nevertheless required the plaintiff to file numerous technical proofs of loss. The time and expense thus consumed at the company's insistence was held to be sufficient detriment. In the case of *Continental Casualty Company v. Curtis,* 94 F. (2d) 710, the company, with full knowledge of its policy defense, withheld disclaimer until after the decision of the personal injury action and did not raise it until its answer was filed in the suit on the policy. By that time the fact witnesses had disappeared and it was held that this detriment was sufficient. In the instant case appellee was notified of the defense *before* the death action and afforded an opportunity to continue

the trial. Appellee not only declined this opportunity, but vigorously resisted appellant's motion for continuance and insisted that the matter proceed to trial. We think it does not lie in her mouth now to claim that she was misled and prevented from conducting a proper investigation where she waived the opportunity to do so. It is further difficult to see how appellee would have secured the full cooperation of Claggett, when Claggett was an adverse party to the death action and represented by counsel. There is no indication or evidence that appellee would have followed any other course had the policy defense been known to all parties from the inception of the dealings between her attorneys and appellant.

V.

THE OMNIBUS CLAUSE IN APPELLANT'S POLICY WAS NOT SUBJECT TO WAIVER, AND COVERAGE UNDER ITS TERMS COULD NOT BE EXTENDED BY THE DEVICES OF WAIVER AND ESTOPPEL.

As pointed out in our opening brief (page 41 *et seq.)* it is necessary to draw a distinction, when dealing with waiver and estoppel, between cases involving a prohibition or condition, breach of which *voids* a policy or causes a *forfeiture,* and the situation where, as here, one is attempting to extend coverage to a person not named in the policy. The omnibus clause here extended the protection of the policy under certain conditions, i.e., it extended coverage to anyone operating the automobile with the permission

of the named insured, Mr. Mehlin. *There could be no breach of this provision.* If this were not true Mr. Mehlin would breach his policy by not giving permission to every person who drove the automobile. Such a contention would be manifestly absurd. The fact that no permission was given, therefore, did not void the policy. The policy continued in full force and effect. Because of the absence of permission, however, its coverage was not extended to Claggett.

As pointed out in our opening brief under the authorities there stated, there can be no waiver or estoppel which will extend coverage in this manner, *after the facts have occurred and the rights of the parties are fixed,* so as to extend coverage or make a new contract. Waiver and estoppel, when dealing with a breach which has occurred *before* the circumstances constituting the waiver and estoppel, can be invoked only to prevent the declaration or enforcement of a forfeiture for breach of a prohibition in the policy.

Appellee, at page 47 of her brief, has cited five cases as authority for the proposition that coverage under an omnibus clause can be extended by means of waiver and estoppel. None of these cases is either a California or a Nebraska decision and the strength of their authority in view of the cases we cite below is therefore extremely questionable. It should be observed, however, that in the case of *Virginia Automobile Insurance v. Brillhart* (1948), 187 Va. 336, 46 S.E. (2d) 377, omnibus coverage was discarded

as a basis for the decision and the Court based its holding upon a finding that the agent had accepted on behalf of the company an oral assignment of the policy. In the cases of *Snedker v. Derby Oil* (1948), 164 Kan. 640, 192 P. 135; *Peterson v. Maloney* (1930), 181 Minn. 437, 232 N.W. 790; and *Horn v. Commonwealth* (1929), 105 N.J.L. 616, 147 Atl. 483, the trial Court in each case had found as a fact that there had been permission. Accordingly, each decision was sustainable on that ground and in each decision the holding relative to omnibus coverage by virtue of waiver and estoppel was unnecessary to the decision.

We disagree with appellee's argument at pages 59 to 60 that a new risk was created. The identity of the named insured and the persons to whom he might trust his car have considerable bearing on the writing of the risk. A non-permitted taking and removal of the vehicle extends the risk to undesirable persons as well as to undesirable places. We think it is self-evident that the risk is increased when the car is entrusted to one who is, in effect, the permittee of a thief.

However this may be, the fact that a new risk was or was not created is immaterial to the issues here under consideration. Appellant does not have to establish an increase of risk under the omnibus clause in order to avoid liability where no permission was given. *Sears v. Illinois Indemnity Company,* 121 Cal. App. 211; *Boole v. Union Marine Ins. Company,* 52 Cal. App. 207; *Home Indemnity Company*

v. Standard Accident Ins. Company, 165 Fed. (2d) 919.

Appellee has cited numerous Nebraska and California cases in support of her contention that resort may be had to the doctrines of waiver and estoppel to extend coverage here. An examination of these cases discloses that, with the exception of two cases discussed below, *every single case* involved a policy provision breach of which rendered the policy null and void and resulted in a forfeiture. Forfeiture cases such as these are inapplicable to the case at bar.

The distinction between forfeiture cases and cases in which it is sought to extend coverage is pointed out in two companion cases cited by appellee, those of *Reid v. Northern Assurance Company* (1923), 63 Cal. App. 114, 218 P. 290, and *Steil v. Sun Insurance Office* (1916), 171 Cal. 795, 155 P. 72. These cases dealt with policies which covered certain goods while kept in a certain building. A loss of these goods while they were out of the building was not covered by the policy. The goods were in fact removed to another building where they were destroyed by fire. As pointed out by the Court in the *Steil* case at page 802, removal of the goods neither forfeited nor voided the policy. At page 800, the Court held:

> "In order to continue the insurance upon the goods, or in other words, to carry it to the goods in the new location, something more was required than a mere notification by the insured to the insurer of the fact that the goods were or were

about to be removed. That fact would only *suspend* the insurance risk. The insurer must be informed or be given good cause to believe that the party insured desired to have the insurance on the goods continued in the new place, that he wished a modification of the policy to make it cover the goods in the new location and must then by positive act or by failure to act, cause the insured to believe that the insurer consented to such transfer or modification and that the goods were covered by the policy. Something in the nature of a *new agreement,* either express or implied from the conduct or condition or created by estoppel was necessary." (Emphasis added.)

The *Reid* case dealt with a re-trial of the same set of facts and accepts the opinion of the *Steil* case as the law of the case. The evidence developed the fact that at the time the goods were removed, the company was notified and requests for approval of transfers were received over the telephone and accepted, i.e., that a *new contract of insurance* had been entered into. In other words, the defendant was held estopped to deny that it had made a new contract of insurance. *It was not contended, nor was it held that the policy covering the goods in their old location extended coverage to the goods in their new location.* With reference to the estoppel point, it was merely held that the company was estopped to deny that the formal requisites regarding writing, etc., were not complied with.

Indeed, with respect to one cause of action where the evidence was not sufficient to establish that a new contract of insurance was entered into, it was held that no estoppel was worked since coverage under the old policy could not thus be extended.

In the case at bar, the insurance contract and its provisions remained unchanged and unmodified throughout. With the exception of the prohibition regarding the declaration as to the place of principal use, which we discuss below, there were no breaches of its conditions. Waiver and estoppel thus are of no avail to appellee in order to extend coverage under the omnibus provision where the facts establish that its terms were not fulfilled.

VI.

THE PROVISIONS OF THE POLICY AGAINST WAIVERS EXCEPT IN WRITING COULD NOT BE WAIVED UNDER THE FACTS OF THIS CASE, AND PREVENT THE EXISTENCE OF WAIVER.

Appellee cites numerous Nebraska and California cases to the effect that a non-waiver clause cannot prevent a waiver, i.e., that a non-waiver clause itself may be waived. Again the distinction between breach of provisions which void or forfeit a policy and attempts to extend coverage under a perfectly valid provision of the policy must be drawn. Those cases which hold that such a provision may be waived upon inspection will be seen to deal with the waiver by a company of its right to declare a *forfeiture* for

breach of a provision which renders the policy *void.* It should further be noted that in many of the cases cited by appellee no non-waiver clause was involved. Indeed, it is difficult to see why appellee cites them in this connection. See *Hunt v. State Insurance Company* (1902), 66 Neb. 121, 92 N.W. 921; *German Insurance Company v. Shader* (1903), 68 Neb. 1, 93 N.W. 972; *German Mutual v. Palmer* (1902), 63 Neb. 688, 92 N.W. 624; *Knarston v. Manhattan Life* (1899), 124 Cal. 73, 56 P. 773; *Grant v. Sun Indemnity Co.* (1938), 11 Cal. (2d) 438, 80 P. (2d) 996.

The case of *Hartford Fire Ins. Co. v. Landfare* (1902), 63 Neb. 559, 88 N.W. 779, far from being of comfort to appellee recognizes that the policy provisions against waiver except in writing are binding.

The remaining California cases stem from the decision in *MacIntosh v. Agricultural Fire* (1907), 150 Cal. 440, 89 P. 102. This case points out that as respecting *past* conduct of the company the non-waiver provisions are perfectly valid. The case, however, holds that with respect to *future* actions and *future* operations such non-waiver provisions can be waived. At page 47 of the decision, it is said:

> "The doctrine is well settled that such stipulations and limitations in a policy regarding the powers of agents and the manner of waiving its conditions do not preclude a waiver by the conduct of authorized agents in regard to *future* operations on the premises".

The cases of *Raulet v. Northwestern* (1910), 157 Cal. 213, 107 P. 292, and *Reid v. Northern* (1923), 63

Cal. App. 114, 218 P. 290, simply affirm the rule of the *MacIntosh* case.

The distinction between these cases and the set of facts in the case at bar is perfectly clear. While the non-waiver clause might not prevent the waiver, as to future acts, of the limitations in the policy, the clause is effectual to prevent waiver, *after the facts have occurred and the rights of the parties are fixed.* But the argument of appellee begs the point, for it will be seen that these rules respecting non-waiver clauses are applied only in instances where a policy provision, breach of which voids the policy and declares it forfeit, was concerned.

At pages 73 and 74 of her brief, appellee argues that the evidence did not show that any of the agents of appellant had no authority to waive the provisions of its policy. Appellee, of course, had the burden of proof to establish coverage below. This argument thus merely serves to demonstrate appellee's failure of proof of this respect.

Appellee at page 75 argues that the reservation of rights executed by Claggett did not cure the waiver and estoppel. As pointed out above appellee has indicated no evidence to give rise to an estoppel or waiver as between Claggett and appellant. Since appellee's rights can rise no higher than those of the person through whom she claims—i.e., Claggett, and since there was no waiver or estoppel as to Claggett, it is difficult to see how she avoids the effect of a reservation of rights which binds him.

VII.

THE DECLARATION CONCERNING PRINCIPAL PLACE OF USE AND GARAGING OF THE VEHICLE WAS BREACHED WHEN THE WIFE BROUGHT THE VEHICLE TO CALIFORNIA WITH THE INTENTION OF REMAINING THERE.

Appellee places great reliance on the case of *Sutton v. Hawkeye Casualty Co.* (1943), 138 Fed. (2d) 681, decided in Sixth Circuit. That decision is not the law in California.

Appellee attempts to distinguish the cases cited in our opening brief on the ground that the policy in question did not state that the declaration was a warranty or that a change in garaging or use would void the policy. Such a statement was not necessary (we submit) since the insurance code of California gives that effect to the provision irrespective of the presence or absence of such a statement in the policy. (See Appellant's Opening Brief, pages 51 and 52. See also *Connecticut Indemnity Co. v. Howe,* 41 Fed. Sup. 222.)

It is claimed that this provision was waived. As we point out above the knowledge of appellant regarding the facts constituting this breach was limited and the fact that Mrs. Mehlin took the car to California with the intention of remaining there was not revealed until August of 1948, after the trial of the death action. The insufficiency of the evidence as to waiver of other policy provisions demonstrates its insufficiency to establish the waiver of a violation of this provision. Further the non-waiver clause referred to above prevented any such waiver after the rights of the parties became vested.

VIII.

CONCLUSION.

The propositions advanced by appellant in its opening brief and the authorities in support thereof are unshaken by anything to be found in the brief for appellee.

We respectfully submit that the judgment entered on the verdict should be reversed with the directions to the trial Court to enter judgment in favor of appellant.

Dated, San Francisco, California,
September 8, 1950.

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